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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 919

BOARD OF COUNTY COMMISSIONERS OF MARSHALL COUNTY, STATE OF OKLAHOMA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The district court did not write an opinion. Its findings of fact and conclusions of law appear in the record at pages 17–21. The opinion of the circuit court of appeals (R. 26–30) is reported in 152 F. 2d 540.

JURISDICTION

The judgment of the circuit court of appeals sought to be reviewed was entered on December 20, 1945 (R. 30). The petition for a writ of certiorari was filed on March 7, 1946. The jurisdic-

tion of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a restricted allotment of less than 160 acres was tax exempt under the Act of May 10, 1928, even though not designated as tax exempt until after it had been sold for taxes.

STATUTE INVOLVED

The pertinent portions of the Act of May 10, 1928, 45 Stat. 495, as amended by the Act of May 24, 1928, 45 Stat. 733, are as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the restrictions against the alienation, lease, mortgage, or other encumbrance of the lands allotted to members of the Five Civilized Tribes in Oklahoma, enrolled as of one-half or more Indian blood, be, and they are hereby, extended for an additional period of twenty-five years commencing on April 26, 1931: *Provided,* That the Secretary of the Interior shall have the authority to remove the restrictions, upon the applications of the Indian owners of the land, and may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe.
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> * * * * *

SEC. 4. That on and after April 26, 1931, the allotted, inherited, and devised restricted lands of each Indian of the Five Civilized Tribes in excess of one hundred and sixty acres shall be subject to taxation by the State of Oklahoma under and in accordance with the laws of that State, and in all respects as unrestricted and other lands: *Provided,* That the Indian owner of restricted land, if an adult and not legally incompetent, shall select from his restricted land a tract or tracts, not exceeding in the aggregate one hundred and sixty acres to remain exempt from taxation, and shall file with the Superintendent of the Five Civilized Tribes a certificate designating and describing the tract or tracts so selected: *Provided further,* That in cases where such Indian fails, within two years from date hereof, to file such certificate, and in cases where the Indian owner is a minor or otherwise legally incompetent, the selection shall be made and certificate prepared by the Superintendent for the Five Civilized Tribes; and such certificate, whether by the Indian or by the Superintendent for the Five Civilized Tribes, shall be subject to approval by the Secretary of the Interior; and, when approved by the Secretary of the Interior, shall be recorded in the office of the Superintendent for the Five Civilized Tribes, and in the county records of the county in which the land is situated; and said lands, designated and described in the approved certificates so recorded,

shall remain exempt from taxation while the title remains in the Indian designated in such approved and recorded certificate, or in any full-blood Indian heir or devisee of the land: *Provided,* That the tax exemption shall not extend beyond the period of restrictions provided for in this Act: *And provided further,* That the tax-exempt land of any such Indian allottee, heir, or devisee shall not at any time exceed one hundred and sixty acres.

STATEMENT

Houston Ward, a full-blood Chickasaw Indian, Roll Number 2922, received an allotment of 224.25 acres of land in Marshall County, Oklahoma, 94.25 acres being his homestead allotment and 130 acres his surplus allotment (R. 17–18). Prior to 1928 he had sold 120 acres of the surplus allotment with the approval of the Secretary of the Interior (R. 18). Thus, when the Act of May 10, 1928 (*supra,* pp. 2–4) became effective, Ward held title to only 104.25 acres of restricted lands, including his original homestead and 10 acres of his surplus allotment (R. 18–19). In 1929 Ward executed a certificate designating his homestead allotment of 94.25 acres as tax exempt, and the certificate was recorded in accordance with the provisions of Section 4 of the 1928 Act (R. 19). In 1941 Ward sold his entire homestead allotment after restrictions thereon had been removed (R. 18). Thereafter, on February 26, 1943, the Superintendent for the Five Civilized

Tribes executed a certificate designating the remaining 10 acres of the surplus allotment as tax exempt, which certificate was duly approved and recorded (R. 19). At no time had any other lands other than the homestead and 10 acres of the surplus allotment been selected as tax exempt by or for Ward (R. 19).

Meanwhile, the 10 acres of the surplus allotment had been placed upon the tax rolls of Marshall County for the years 1935 to 1940, inclusive, and were sold to the county in 1942 for nonpayment of taxes (R. 19–20). On July 21, 1942, the county conveyed the tract to petitioner Jack H. Smith by regular resale deed (R. 10–12, 20).

Under these circumstances, the United States, in its own behalf and on behalf of its Indian ward, instituted this action against the county officials and Smith to cancel the tax assessments, tax sale and deed, to restrain future assessments, and to quiet title to the 10 acres of his surplus allotment in Houston Ward (R. 1–5, 12–16). Petitioners defended on the grounds that, since the 10-acre tract was not designated as tax exempt at the same time the homestead was so designated, the right to select the 10 acres as tax exempt was lost; that in any event the selection of the 10 acres was not timely made, especially in view of the intervening assessments and tax sales; and that petitioner Smith would have no remedy if his tax deed were voided (R. 5–9, 16–17). Following the decision in *Zweigel* v. *Webster,* 32 F.

Supp. 1015 (E. D. Okla.), the district court concluded that under the 1928 Act, Ward was entitled to a tax exemption for the 104.25 acres remaining of his allotted lands, and that his failure to designate the 10 acres when he designated the homestead did not make the 10 acres subject to taxation (R. 20–21). The court held the tax sale and deed to Smith to be void (R. 21) and entered appropriate judgment (R. 21–23).

On appeal the judgment of the district court was affirmed by the court below (R. 30), which reasoned that the paramount purpose of Section 4 of the 1928 Act was to insure that up to 160 acres of the restricted allotments of members of the Five Civilized Tribes should remain exempt from taxation; that the provisions for designation of the lands to be exempt were not a condition precedent to the right to an exemption, especially when such an Indian owned less than 160 acres; that it was immaterial that the allottee here involved had made a partial designation covering another tract prior to the designation by the Superintendent of the parcel now in question; and that as between the Indian and the purchaser at the tax sale, the equities were in favor of the Indian (R. 29–30). The court below then concluded that the designation by the Superintendent of the 10 acres involved was valid, and that the designation related back to the effective date of the 1928 Act (R. 30).

ARGUMENT

1. By virtue of Section 29 of the Act of June 28, 1898, 30 Stat. 495, 507, and Section 1 of the Act of May 27, 1908, 35 Stat. 312, all the allotted lands of full-blood Chickasaw Indians were restricted against alienation and exempt from all taxation until April 26, 1931. Cf. *United States* v. *Rickert,* 188 U. S. 432; *Choate* v. *Trapp,* 224 U. S. 665. Section 1 of the Act of May 10, 1928, 45 Stat. 495 (*supra,* p. 2), extended the restrictions against alienation for 25 more years, or until April 26, 1956. In the absence of any provision for the taxation of the restricted allotments, they would have continued in a tax-exempt status until 1956. *United States* v. *Rickert,* 188 U. S. 432, 438; *Zweigel* v. *Webster,* 32 F. Supp. 1015, 1017–1018 (E. D. Okla.). Hence, it is plain that Congress, by providing in Section 4 of the 1928 Act (*supra,* pp. 3–4) that the restricted allotments in excess of 160 acres "shall be subject to taxation," intended to guarantee to the Indians that 160 acres of their restricted allotments would "remain exempt from taxation" while restricted and did not intend that the designation and recordation provided for in the same Section should be a condition precedent for the exemption. *Zweigel* v. *Webster,* 32 F. Supp. 1015, 1018–1019 (E. D. Okla.); cf. *Muskogee County* v. *United States,* 133 F. 2d 61, 64 (C. C. A. 10), certiorari denied (petition untimely filed), 319 U. S. 745; *Seber* v. *Board of County Com'rs,*

38 F. Supp. 731, 734–735 (N. D. Okla.), modified and affirmed, 130 F. 2d 663 (C. C. A. 10), affirmed, 318 U. S. 705; *United States* v. *Thurston County, Neb.*, 54 F. Supp. 201, 209–210 (D. Neb.), affirmed, 149 F. 2d 485 (C. C. A. 8), certiorari denied, October 8, 1945, No. 352, present Term. See S. Rep. No. 982, 70th Cong., 1st sess.; Hearing, H. Committee on Indian Affairs, H. R. 12000, 70th Cong., 1st sess. pp. 7, 74.

It is doubtless true that the provisions for designation of the 160 acres to remain tax exempt and for recording the certificate were inserted to assist the counties of Oklahoma in determining which of an Indian's restricted lands were taxable. But this is no indication that the exemption depended upon the procedural requirements of execution and recordation of the certificate. Moreover, there is no warrant for reading into the statute a time limit for the designation by the Superintendent. *Zweigel* v. *Webster*, 32 F. Supp. 1015, 1019 (E. D. Okla.). Congress did not impose such a limitation, and in the absence of a more definite statement of intention than the 1928 Act affords, it would indeed be contrary to all rules for the construction of Indian statutes to impute to Congress an intention to declare the tax exemption forfeited if for some reason the Indian or Superintendent failed or neglected to execute a certificate. This would be especially true when, as here, the Indian had less than 160 acres of restricted lands when the Act was passed (R. 18–19) and the reasons for

requiring a selection were non-existent since all his land was meant to be tax exempt. There is nothing in the statute which makes the lands taxable in the event of a failure to act.

2. Petitioners also complain (Pet. 20–21) of the conclusion of the court below that the designation made by the Superintendent after the land had been sold for taxes should relate back to the effective date of the Act. But, if, as has been shown (*supra*, pp. 7–9), the filing of a designation was not a condition precedent to the exemption, it is immaterial whether or not any designation had been filed at all, or a designation had been filed after the property had been sold. *Zweigel* v. *Webster*, 32 F. Supp. 1015 (E. D. Okla.). However, in any event, in order to do justice by avoiding the loss of the right to exemption, the use of the doctrine of relation back to make the certificate effective as of April 26, 1931, would be both logical and proper in this case. Cf. *McCurdy* v. *United States*, 264 U. S. 484, 487. The doctrine has been used in similar cases under a comparable statute (Act of May 19, 1937, 50 Stat. 188). *Muskogee County* v. *United States*, 133 F. 2d 61, 64 (C. C. A. 10), certiorari denied (petition untimely filed), 319 U. S. 745; *United States v. Thurston County, Neb.*, 54 F. Supp. 201, 209–210 (D. Neb.), affirmed, 149 F. 2d 485 (C. C. A. 8), certiorari denied, October 8, 1945, No. 352, present Term. In both these cases it was held that a designation made after assessment, but before the tax sale, re-

lated back to the effective date of the Act. The same reasoning is applicable when, as here, the designation was not made until after the sale. The county is in the same position whether the designation was filed before or after the sale. The only other party affected is the purchaser at the tax sale. But he is not in the position of a *bona fide* purchaser for value without notice, and as to him the doctrine of *caveat emptor* applies. *Howerton* v. *Board of Commissioners of Tulsa County,* 191 Okla. 169. The purchaser's remedy in the situation in which he found himself was to seek relief from the county's Re-Sale Property Fund as provided in Oklahoma Statutes Annotated (1941), Title 68, sec. 432 (l), rather than at the expense of the Indian owner. Moreover, the tax sale in this case took place in 1942, more than two years after the decision in *Zweiger* v. *Webster,* 32 F. Supp. 1015 (E. D. Okla.), wherein it was held that the absence of a designation did not prevent the invalidation of a tax deed. Surely, the county and the purchaser must be considered to have run the risk of acting contrary to the prevailing interpretation of the law.

3. Petitioners' contention (Pet. 20) that the Superintendent had no power to file a certificate covering the 10 acres at issue because the Indian ward had already filed a designation of 94.25 acres has no support in the statute. As has been shown (*supra,* pp. 7–9), the 10 acres were exempt from taxation whether or not a designation was

filed. Furthermore, there is no provision in the Act from which it can even be implied that the designation of the 160 acres must be made at one time or the exemption lost to the extent not covered by the first designation. Cf. *Zweigel* v. *Webster,* 32 F. Supp. 1015 (E. D. Okla.). In fact, the final sentence of Section 4 points to the contrary.[1] Hence, since the Indian had failed to exercise his rights to the fullest extent, there can be no doubt that under the statute the Superintendent could file a supplemental designation.

4. Petitioners also urge that the interpretation of the statute by the courts below would seriously disrupt the tax-collecting machinery of most of the counties of Oklahoma (Pet. 8–9). But, since the county had no right to place the lands here involved on the tax rolls, it is immaterial that the voiding of the tax assessments and tax sale might disrupt its tax-collecting machinery and embarrass its finances. *Board of Commissioners* v. *Seber,* 318 U. S. 705, 718. Petitioners' further argument that the courts have been too liberal in determining the legislative intent in connection with Indian statutes (Pet. 15–19) is likewise without any logical basis. In fact, with respect to two of the three instances cited by petitioners (Pet. 15–16, 18), the curative legislation plainly approved the interpretation of the statutes by the

[1] This sentence reads: "That the tax-exempt land of any such Indian allottee, heir, or devisee shall not at any time exceed one hundred and sixty acres."

courts and merely provided relief to those individuals misled by their own statutory misinterpretations, at the same time leaving in effect the courts' interpretations for future transactions. The fact that in the third instance (Pet. 17–18) Congress in effect amended the statute is no indication that the courts incorrectly interpreted the original legislation. In that instance, Congress apparently had a change of heart. Rather than indicating that the courts have been too liberal in construing Indian legislation, the instances cited by petitioners indicate that if their cause is meritorious, a remedy should be sought in Congress rather than in the courts.

CONCLUSION

The decision below is correct and there is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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